

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

|                                    |   |                            |
|------------------------------------|---|----------------------------|
| STEPHEN S. HURST,                  | ) | Case No. 11-3364 SC        |
|                                    | ) |                            |
| Plaintiff,                         | ) | ORDER GRANTING PLAINTIFF'S |
|                                    | ) | <u>MOTION TO REMAND</u>    |
| v.                                 | ) |                            |
|                                    | ) |                            |
| FUTURESELECT PORTFOLIO MANAGEMENT, | ) |                            |
| INC., a Delaware Corporation;      | ) |                            |
| FUTURESELECT PRIME ADVISOR II LLC; | ) |                            |
| a Delaware Limited Liability       | ) |                            |
| Company; ALDARRA FUND SPC, a Grand | ) |                            |
| Cayman Islands Segregated          | ) |                            |
| Portfolio Company, RONALD C. WARD, | ) |                            |
| an individual; and DOES 1-50,      | ) |                            |
| inclusive,                         | ) |                            |
|                                    | ) |                            |
| Defendants.                        | ) |                            |

**I. INTRODUCTION**

Before the Court is a Motion to Remand filed by Plaintiff Stephen S. Hurst ("Plaintiff" or "Hurst"). ECF No. 11 ("Mot."). Defendants FutureSelect Portfolio Management, Inc. ("FutureSelect"), FutureSelect Prime Advisor II LLC ("Prime Advisor LLC"), Aldarra Fund SPC ("Aldarra"), and Ronald C. Ward ("Ward") (collectively, "Defendants") filed an Opposition. ECF No. 21. ("Opp'n"). Plaintiff submitted a Reply. ECF No. 26. ("Reply"). For the following reasons, Plaintiff's Motion is GRANTED.

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**II. BACKGROUND**

This action arises from Plaintiff's efforts to recover \$600,000 he allegedly lost due to the "ponzi scheme" run by Bernard Madoff. Plaintiff is a resident of Foster City, California. ECF No. 1 ("Not. of Removal") Ex. A ("FAC") ¶ 2.<sup>1</sup> He alleges that: Prime Advisor LLC is a hedge fund; Aldarra is the parent entity of Prime Advisor LLC; FutureSelect is an investment firm that serves as the fund manager of Aldarra and Prime Advisor LLC; and Ward is the CEO and owner of FutureSelect and a resident of Washington. FAC ¶¶ 4-5.

Plaintiff alleges that in early 2008 his financial advisor, KSM Capital Advisors ("KSM"), approached him about the prospect of investing in Aldarra. Id. ¶ 9. KSM provided him with Aldarra's Offering Memorandum and advertising materials that described Aldarra and the various hedge funds, including Prime Advisor LLC, that were part of Aldarra's portfolio. Id. Plaintiff alleges that, in reliance on the offering memorandum and advertising materials, he invested \$600,000 of his retirement savings in Prime Advisor LLC. Id. ¶ 13. He alleges that, unbeknownst to him, Prime Advisor LLC was simply a "feeder fund" that invested its assets -- through a variety of intermediaries -- with Bernard L. Madoff Investment Securities, Inc. ("BLMIS"). Id. ¶ 14.

Plaintiff did not know that his funds had been invested in BLMIS until FutureSelect informed him of this fact in December 2008, when BLMIS was publicly revealed to be a fraudulent "ponzi

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<sup>1</sup> Exhibit A to the Notice of Removal contains both Plaintiff's original complaint and his First Amended Complaint ("FAC"), as both were filed in state court.

1 scheme." Id. ¶ 16. In light of this revelation, Plaintiff alleges  
2 that the Aldarra Offering Memorandum was materially false and  
3 misleading because, inter alia, it described Prime Advisor LLC's  
4 objective as "low volatility" and "provid[ing] consistent, risk-  
5 adjusted returns," and it stated that Prime Advisor LLC had earned  
6 an average annual rate of return of 11.65 percent since January  
7 1998. Id. ¶¶ 10-11, 14. Plaintiff also alleges that the  
8 advertising materials he received were prepared by Defendants and  
9 contained false statements describing Prime Advisor LLC/Aldarra as  
10 a "Low Volatility, Bond Alternative" and representing that it had  
11 earned an average annual return of 11.42 percent since inception.  
12 Id. ¶¶ 12, 14.

13 Plaintiff filed this action on December 13, 2010 in the  
14 Superior Court of California, County of San Mateo. Not. of Removal  
15 Ex. A ("Compl."). He filed the FAC on June 16, 2011, asserting the  
16 following four state law causes of action: (1) fraud against all  
17 Defendants; (2) negligent misrepresentation against all Defendants;  
18 (3) violation of California Corporations Code Section 25401 against  
19 Aldarra and Prime Advisor LLC; and (4) control person liability  
20 under California Corporations Code Section 25504 against Ward,  
21 Aldarra, and FutureSelect. See FAC. On July 7, 2011, Defendants  
22 removed the case to federal court on the basis of diversity  
23 jurisdiction. Not. of Removal ¶ 6.

24 In his Motion, Plaintiff argues that removal was improper  
25 because Prime Advisor LLC is actually a California citizen, and  
26 because Defendants did not properly plead the citizenship of Prime  
27 Advisor LLC and Aldarra. Mot. at 1. In response, Defendants argue  
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1 that removal was proper because Prime Advisor LLC was fraudulently  
2 joined. Plaintiff replies that Defendants' fraudulent joinder  
3 argument is time-barred and that Prime Advisor LLC was properly  
4 joined. Plaintiff also seeks attorney's fees.

5  
6 **III. LEGAL STANDARD**

7 Any civil action brought in a state court may be removed to  
8 this Court if there is complete diversity of citizenship and where  
9 the amount in controversy exceeds \$75,000. 28 U.S.C. §§ 1332,  
10 1441. The Court may remand an action to state court for lack of  
11 subject matter jurisdiction or for any defect in the removal  
12 procedure. See 28 U.S.C. § 1447(c); Tengler v. Spare, No. C-95-  
13 33421 SI, 1995 WL 705142, at \*2 (N.D. Cal. Nov. 15, 1995). As a  
14 general rule, the court must strictly construe the removal statute,  
15 "and any doubt about the right of removal requires resolution in  
16 favor of remand." Moore-Thomas v. Alaska Airlines, Inc., 553 F3d  
17 1241, 1244 (9th Cir 2009). "The presumption against removal means  
18 that the defendant always has the burden of establishing that  
19 removal is proper." Id. (internal quotations omitted).

20 A defendant may remove a case lacking complete diversity and  
21 seek to persuade the district court that any non-diverse defendant  
22 was fraudulently joined. McCabe v. Gen. Foods Corp., 811 F.2d  
23 1336, 1339 (9th Cir. 1987). "If the plaintiff fails to state a  
24 cause of action against a resident defendant, and the failure is  
25 obvious according to the settled rules of the state, the joinder of  
26 the resident defendant is fraudulent." Id. A defendant must prove  
27 fraudulent joinder by clear and convincing evidence, and there is a  
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1 general presumption against fraudulent joinder. Hamilton  
2 Materials, Inc. v. Dow Chem. Corp., 494 F.3d 1203, 1206 (9th Cir.  
3 2007).

4  
5 **IV. DISCUSSION**

6 **A. Remand**

7 Defendants removed this action, alleging in the Notice of  
8 Removal that complete diversity of citizenship exists. Defendants  
9 alleged that Prime Advisor LLC is a Delaware LLC with its principal  
10 place of business in Washington; FutureSelect is a Delaware  
11 corporation with its principal place of business in Washington,  
12 Aldarra is a segregated portfolio company organized under the laws  
13 of Grand Cayman Islands with its principal place of business in  
14 Washington, and Ward is a citizen of Washington. Relying on 28  
15 U.S.C. § 1332(c)(1), which states that "a corporation shall be  
16 deemed to be a citizen of any State by which it has been  
17 incorporated and of the State where it has its principal place of  
18 business," Defendants alleged that Prime Advisor LLC and  
19 FutureSelect are citizens of Delaware and Washington, and that  
20 Aldarra is a citizen of Grand Cayman Islands and Washington.

21 Plaintiff, in his moving papers, argues that Defendants erred  
22 by treating Aldarra and Prime Advisor LLC as though they were  
23 corporations for citizenship purposes when in fact they are not.  
24 Plaintiff argues that for purposes of diversity jurisdiction, all  
25 artificial entities other than corporations are citizens of the  
26 states of which their members are citizens. Mot. at 5 (citing  
27 Carden v. Arkoma Assoc., 494 U.S. 185, 189 (1990)). He thus argues  
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1 that the Notice of Removal is procedurally defective because  
2 Defendants did not plead the citizenship of the members of Aldarra  
3 or Prime Advisor LLC. More fundamentally, Plaintiff argues that  
4 complete diversity does not exist in this case because Plaintiff, a  
5 California resident, is a member of Prime Advisor LLC, which  
6 renders Prime Advisor LLC a citizen of California for diversity  
7 purposes.

8 Under clearly established Ninth Circuit law, "an LLC is a  
9 citizen of every state of which its owners/members are citizens."  
10 Johnson v. Columbia Props. Anchorage, LP, 437 F.3d 894, 899 (9th  
11 Cir. 2006). In light of this rule, Defendants concede that the  
12 citizenship of Prime Advisor LLC is properly determined by the  
13 citizenship of its members.<sup>2</sup> Defendants also apparently concede  
14 that under this rule Prime Advisor LLC is a California citizen.  
15 Nevertheless, Defendants argue that Prime Advisor LLC's citizenship  
16 should be disregarded under the fraudulent joinder doctrine.

17 Specifically, Defendants contend that the fraudulent joinder  
18 doctrine applies because Plaintiff has mistakenly sued Prime  
19 Advisor LLC when, in fact, Plaintiff has no relationship with Prime  
20 Advisor LLC. Opp'n at 1. Defendants believe that Plaintiff is  
21 confusing Prime Advisor LLC with a portfolio of shares in which  
22 Aldarra invested, which is named "Prime Advisor Segregated  
23 Portfolio Shares." Id. Due to this mistake, Defendants contend,  
24 Plaintiff cannot state a claim against Prime Advisor LLC, rendering

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25 <sup>2</sup> Defendants still maintain, however, that the citizenship of  
26 Aldarra, a segregated portfolio company, is determined under the  
27 rule that applies to corporations. Because the citizenship of  
28 Aldarra is irrelevant to the Court's decision, the Court does not  
address which rule of citizenship applies to segregated portfolio  
companies.

1 the joinder of Prime Advisor LLC fraudulent. Plaintiff vigorously  
2 denies any confusion and asserts that he owns shares of Prime  
3 Advisor LLC. Both sides submit documentary evidence in support of  
4 their position.

5       Whatever the merits of Defendants' fraudulent joinder  
6 argument, the Court need not reach it. Because Defendants did not  
7 allege fraudulent joinder in their Notice of Removal, and the time  
8 period for amending the Notice has passed, the claim is time-  
9 barred. Under 28 U.S.C. § 1446(b), a defendant must file a notice  
10 of removal within thirty days of receiving a "paper from which it  
11 may first be ascertained that the case is removable." After the  
12 thirty day period has expired, "the removal petition cannot be . .  
13 . amended to add allegations of substance." Barrow Dev. Co. v.  
14 Fulton Ins. Co., 418 F.2d 316, 317 (9th Cir. 1969). Allegations of  
15 fraudulent joinder constitute a substantive basis for removal that  
16 must be raised before the thirty-day removal deadline expires.  
17 Awasthi v. Infosys Techs., Ltd., No. C-10-0783 JCS, 2010 U.S. Dist.  
18 LEXIS 57824, at \*12 (N.D. Cal. May 21, 2010) ("the Defendants'  
19 arguments in opposition to the present remand motion regarding  
20 fraudulent joinder are beyond the thirty day time limit and will  
21 not be considered by this Court"); Dean Witter Reynolds, Inc. v.  
22 Swett & Crawford, No. C-92-3841-JPV, 1992 U.S. Dist. LEXIS 20093,  
23 at \*2-3 (N.D. Cal. Dec. 23, 1992) (holding fraudulent joinder claim  
24 was time-barred when raised in opposition to motion to remand after  
25 30-day removal period).

26       Here, Defendants allege that they first learned the case was  
27 removable when they received Plaintiff's FAC on June 16, 2011.

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1 Not. of Removal ¶¶ 1-2. They did not raise the issue of fraudulent  
2 joinder until their Opposition, which was filed on August 22, 2011,  
3 well after the expiration of the thirty-day removal period.

4 For the foregoing reasons, the Court finds that Defendants  
5 have failed to meet their burden of establishing that complete  
6 diversity exists. See Moore-Thomas, 553 F.3d at 1244 ("the  
7 defendant always has the burden of establishing that removal is  
8 proper"). Accordingly, the Court GRANTS Plaintiff's Motion to  
9 Remand.

10 **B. Attorney's Fees**

11 Title 28 U.S.C. § 1447(c) provides, in relevant part, that  
12 "[a]n order remanding the case may require payment of just costs  
13 and any actual expenses, including attorney fees, incurred as a  
14 result of the removal." A district court is permitted under 28  
15 U.S.C. § 1447(c) to award attorney's fees if the removing party  
16 lacked an objectively reasonable basis for the removal. Martin v.  
17 Franklin Capital Corp., 546 U.S. 132, 136 (2005).

18 Plaintiff argues that Defendants lacked an objectively  
19 reasonable basis for removal because they overlooked the Ninth  
20 Circuit's holding in Johnson that the citizenship of a limited  
21 liability company is determined by the citizenship of its members.  
22 Despite their oversight, however, it is conceivable that Defendants  
23 may have prevailed had they properly alleged fraudulent joinder in  
24 the Notice of Removal. The Court cannot conclude on this record  
25 that Defendants' conduct was objectively unreasonable.

26 Plaintiff's request for attorney's fees is therefore DENIED.

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1    **V.    CONCLUSION**

2            For the reasons stated above, Plaintiff Stephen S. Hurst's  
3 Motion to Remand this case to the Superior Court of California,  
4 County of San Mateo, is GRANTED. Plaintiff's request for  
5 attorney's fees is DENIED.

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7            IT IS SO ORDERED.

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9            Dated: December 16, 2011

  
UNITED STATES DISTRICT JUDGE